

That is particularly the case here because the sentences in question cannot be read in isolation from the rest of the investigative process. The facts relevant to the statements in question were included in the report, and Mr. Witsaman's status was the subject of further filings and discussions with Bureau staff. See attached Bernthal Declaration.

All of these reports and discussions reflected the decision made by the Company as soon as the false filings were discovered that full disclosure would be made to the Commission of all relevant facts. See Bernthal Declaration. When Wiley, Rein & Fielding joined the investigation, that firm concurred completely with that decision. See attached Declaration of Richard E. Wiley. Having embarked on that course, the Company and every attorney involved in the investigation were acutely aware that the only acceptable way to respond to derelictions as substantial as those discovered here would be to prepare and present to the Commission a complete and absolutely candid report stating what had happened, how it had happened, who had been responsible, and the measures the Company would take to insure that similar derelictions could never happen again. See the attached Wiley, Pettit and Bernthal Declarations. It is patently unreasonable

for the HDO to suggest that the experienced and highly reputable attorneys involved in this process would abandon this purpose and deliberately attempt to mislead the Commission on a peripheral issue involving a single employee.

### **III. CONCLUSION**

The facts summarized and analyzed above and the attached Declarations show clearly that inclusion of the paragraph 14(b) issue in this proceeding was based on mistakes of fact and a less than complete reading of the Counsel's Report. The Commission should therefore delete the issue, as it has done in prior cases involving analogous circumstances. Upon a determination that the issue should be deleted, we further request that the Commission immediately issue a public notice of that result, with the Commission's opinion to follow at a subsequent date. Such expedited action is necessary in view of the extraordinarily accelerated hearing schedule and the very substantial preparation

presently underway for trial of matters pertaining to the  
paragraph 14(b) issue.

Respectfully submitted,

MOBILEMEDIA CORPORATION

A handwritten signature in black ink, appearing to read "Alan Y. Naftalin", is written over a horizontal line.

Alan Y. Naftalin  
Arthur B. Goodkind  
Koteen & Naftalin, L.L.P.  
1150 Connecticut Avenue, N.W.  
Suite 1000  
Washington, D.C. 20036  
(202) 467-5700

Its Attorneys

May 21, 1997

## DECLARATION OF ERIC L. BERNTHAL

I am a partner with the law firm of Latham & Watkins, 1001 Pennsylvania Avenue, N.W., Washington, D.C. and a member in good standing of the District of Columbia Bar. I have practiced communications law before the Federal Communications Commission continuously for almost 25 years.

I was the initial Latham and Watkins Communications attorney involved in the investigation and reporting of the application filing violations by MobileMedia Corporation and its subsidiaries ("MobileMedia" or "the Company") that are now the subject of an FCC hearing in WT Docket No. 97-115. In the very earliest stages of the investigation, the extent and gravity of the violations became apparent to me and to the Company's board of directors. I recommended, and the Company's directors agreed, that we would conduct a complete, no-holds-barred inquiry into the wrongdoing that had occurred, that we would identify the persons responsible for it so that the Company could deal with them appropriately, and that we would report the complete results of the investigation to the Federal Communications Commission as quickly as possible.

On September 4 and September 26, 1996, I met with Michelle C. Farquhar, then Chief of the Wireless Telecommunication Bureau, to advise her of our preliminary findings, promising that our written report would be filed as rapidly as possible. This disclosure was made entirely at the Company's initiative and to the best of my knowledge was the first knowledge imparted to the Commission about the false application filings. On October 15, 1996, we filed our investigative report. It was the first of many filings in which we continued to provide information as part of our ongoing dialogue with the Bureau.

At the time the report was submitted, the Company's Regulatory Counsel, who had been responsible for conceiving the plan to file false applications and who had prepared, signed and filed the applications, had been terminated. The person next above him in the chain of command, the Company's General Counsel, who had known of the false filings, had also been terminated. It had been reported to us in the investigation that the next two persons up in the corporate hierarchy, the Company's former Chief Operating Officer and Chief Executive Officer, had also known of the false filings and had endorsed them. Those two persons had


already left the Company before the false filings were discovered. Our investigation had also determined that there were other employees who had only known of the false filings, but who had not taken part in the filings themselves or been in the chain of command above the person who did the filings. A decision had been made by the Company not to terminate such employees who had only known.

I am familiar with the language in the October 15 Counsel's Report relating to the matters above that has been characterized as misleading in paragraphs 3 and 10 of the hearing designation order in WB Docket No. 97-115. I regret that the Commission has interpreted that language to mean anything other than the facts stated in the previous paragraph. Neither I nor, to my knowledge, anyone else involved in preparing and submitting the report had any intention other than to state those facts and we certainly had no intent to conceal the fact that Mark Witsaman, the Company's Senior Vice President/Chief Technology Officer, was one of the persons who had known of the false filings. Indeed, the October 15 Report itself clearly revealed the knowledge of Mr. Witsaman (among other employees) and Mr. Witsaman's position in the Company. Any such attempt to mislead the Commission or to be less than fully candid as to this or any other matter would have been totally at odds with what had been the entire purpose of our investigation and disclosure effort.

Moreover, the October 15 Report was also only one of numerous submissions to and discussions with the Wireless Telecommunications Bureau's staff concerning all aspects of the investigation, including specifically Mr. Witsaman and the Company's decision to continue his employment.

From the outset, we urged the Bureau to alert us to any questions it might have concerning any aspect of the investigation or our submissions. Mr. Witsaman's possible culpability and the Company's decision to retain him were specifically addressed in filings made on November 20, 1996 and January 31, 1997. I also explicitly raised and discussed these subjects in face-to-face meetings with the Bureau staff and actively sought the staff's views as to the appropriateness of the Company's decision not to terminate Mr. Witsaman.

I declare under penalty of perjury that the foregoing  
statement is true and correct to the best of my knowledge and belief.

  
\_\_\_\_\_  
Eric L. Bernthal

May 21, 1997

## DECLARATION OF ROBERT L. PETTIT

I am a partner in the law firm of Wiley, Rein & Fielding in Washington, DC. and a member in good standing of the District of Columbia Bar. I have been engaged in the practice of law since 1977, both as a private attorney and in the public sector.

In my government capacities, I have been involved in a number of internal and external investigations. Accordingly, I have a keen appreciation both of the conduct of investigations and of the need for accuracy in all reports filed with a federal agency.

I participated in the investigation and reports to the FCC that preceded issuance of the hearing designation order concerning MobileMedia Corporation, et al., WT Docket No. 97-115. I first became involved with this matter on September 20, 1996, and participated actively thereafter in numerous meetings and other communications with the Wireless Telecommunications Bureau, the Office of the General Counsel and the offices of FCC Commissioners.

From the time I first became involved in the investigation, I understood its purpose to be to develop a complete factual record as to the false application filings by MobileMedia, to report our findings to the FCC, and to report remedial measures the company had taken and proposed to take to prevent recurrence of any wrongdoing. I understood this to include a description of personnel actions taken by the Company.

In our meetings and other communications with the Wireless Telecommunications Bureau, we repeatedly reaffirmed our intention to supply any and all information that the Bureau deemed relevant. We repeatedly offered to answer any questions that might arise, including questions resulting from any information filed during the course of the investigation. See, for example, the attached E-mail dated November 15, 1996, from me to the Bureau's Deputy Chief. We repeatedly offered to make our employees and records available to the Commission. Moreover, we repeatedly offered to do what we could to help secure the availability of former employees of the company.

As a result of this effort, we voluntarily made available to the Bureau for formal depositions (as requested by the Bureau) the six members of the Board of Directors and Mr. Witsaman. We also helped secure the voluntary testimony of the Company's former Chief Operating Officer and pledged to do what we could to help the Commission gain the testimony of the Company's former General Counsel and former Regulatory Counsel. We provided the names and addresses of current and former employees and directors (as requested by the Bureau). Indeed, to my knowledge, at no time did the Company refuse to make any employee available to the Commission.

In addition, we made available hundreds of pages of documents (both on our own and at the request of the Commission staff). Here, again, while we certainly had discussions regarding the scope of the document production requests, to my knowledge there is no document that we refused to make available to the Commission.

Numerous questions were raised by various Commission staff members. On each of these occasions, we endeavored to answer the questions as completely as we could as we understood them and within the time that we were given by the Commission staff. Again, to my knowledge there was no question that we refused to answer or fact that we refused to provide.

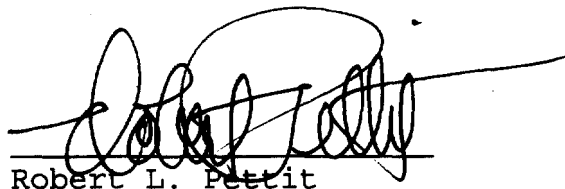
I reviewed all or most of the written filings made with the FCC concerning the investigation, including the October 15 Counsel's Report. At the time the report was submitted, the Company's Regulatory Counsel, who had been responsible for conceiving the plan to file false applications and who had prepared, signed and filed the applications, had been terminated. The person next above him in the chain of command, the Company's General Counsel, who had known of the false filings, had also been terminated. It had been reported to us in the investigation that the next two persons up in the corporate hierarchy, the Company's former Chief Operating Officer and Chief Executive Officer, had also known of the false filings and had endorsed them. Those two persons had already left the Company before the false filings were discovered. Our investigation had also determined that there were other employees who had only known of the false filings, but who had not taken part in the filings themselves or been in the chain of command above the person who

did the filings. A decision had been made by the Company not to terminate such employees who had only known.

I am familiar with the language in the October 15 Counsel's Report relating to the matters above that has been characterized as misleading in paragraphs 3 and 10 of the hearing designation order in WB Docket No. 97-115. I regret that the Commission has interpreted that language to mean anything other than the facts stated in the previous paragraph. Neither I nor, to my knowledge, anyone else involved in preparing and submitting the report had any intention other than to state those facts and we certainly had no intent to conceal the fact that Mark Witsaman, the Company's Senior Vice President/Chief Technology Officer, was one of the persons who had known of the false filings. Indeed, the October 15 Report itself clearly revealed the knowledge of Mr. Witsaman (among other employees) and Mr. Witsaman's position in the Company. Any such attempt to mislead the Commission or to be less than fully candid as to this or any other matter would have been totally at odds with what had been the entire purpose of our investigation and disclosure effort.

Although we had numerous discussions with the Commission staff and, as stated above, answered numerous questions from the Commission staff, at no time during the course of the Bureau's investigation do I recall anyone at the FCC calling into question the accuracy of the October 15 Counsel's Report. More particularly, at no time do I recall anyone at the FCC suggesting that the report failed to reflect Mr. Mark Witsaman's knowledge of the wrongdoing or his status as an officer of the Company. Indeed, I believed that these facts were clearly reflected in the report.

I hereby declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.



Robert L. Pettit

5/21/97  
(Date)

**To:** RALLEN @ FCC.GOV @ SMTP  
**cc:**  
**From:** Robert Pettit/WRF  
**Date:** 11/15/96 09:45:24 AM  
**Subject:** MobileMedia

Roz: Thanks, again, for the meeting yesterday. As we indicated yesterday, we stand ready to cooperate in any way we can. I have a call in to Howard to start working on the deposition schedule for the directors; I think that they could all be available within the next several days. In addition, I have talked to one of my partners who does white collar criminal work (Chris Cerf - who until a short time ago worked with Kathy Wallman at the White House counsel's office), and will offer to meet with Peter to see if we can offer any help there. Also, to the extent that there are any remaining factual questions, we are obviously anxious to answer those, too. By the way, feel free to contact me any time about whatever you need -- or if you run into any problems in your investigation. My office number is: 429-7019. My secretary's (Twanna Johnson) number is: 828-3251. My home number is: 202-237-2572. My cellular number is: 202-321-1733. My pager number is: 202-896-0248.

## **DECLARATION OF RICHARD E. WILEY**

I am a partner in the law firm of Wiley, Rein and Fielding, 1776 K St., N.W., Washington D.C. and a member in good standing of the District of Columbia Bar. I have been engaged in the practice of law since 1958, both as a private attorney and in the public sector.

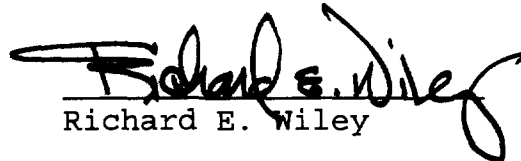
On September 20, 1996, our firm was engaged to act as co-counsel with respect to the investigation and reports made to the Federal Communications Commission that preceded issuance of the hearing designation order concerning MobileMedia Corporation, et al., WT Docket No. 97-115. At the time our firm was engaged, the investigation of MobileMedia's false application filings by Latham & Watkins had been underway for a month, and Latham and Watkins had already made an initial report to the Company's Board of Directors. I understood that a decision had previously been made by the Company's Board Chairman and Latham & Watkins to conduct a thorough investigation of the wrongdoing that had occurred and to report to the FCC all of the findings of that investigation as well as remedial steps, including personnel actions and the institution of a compliance program, that had been taken and were to be taken by the Company.

Upon reviewing the facts, it was clear to me that the course of action the Company had undertaken was the only acceptable way to proceed. I concurred completely with the recommendations that Latham & Watkins had made to the Board with respect to the investigation and the report that was to be made to the FCC concerning the investigation. In my discussions with the other attorneys of both firms who participated in this effort, it was always clear to me that everyone understood the absolute need for complete and candid disclosure to the FCC in any case of this nature. To the best of my knowledge, all of our filings were fully consistent with this guiding principle.

I personally participated in meetings with Wireless Telecommunications Bureau staff concerning the MobileMedia investigation. At these meetings, we expressed the Company's desire to cooperate fully with the Bureau in developing any and all information they believed to bear on the Company's wrongdoing. We invited questions from the Bureau concerning any aspect of the matter or about any of the materials we had filed. To the best of my knowledge, we always responded fully to such questions. During the course of the investigation, the Company

and counsel frequently waived attorney-client privilege and attorney work product privilege in order to present specific documents to the Commission.

I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

  
Richard E. Wiley

May 21, 1997  
Date)

# DECLARATION OF CHRISTOPHER D. CERF

I am a partner in the law firm of Wiley, Rein & Fielding, Washington, D.C. and a member in good standing of the District of Columbia Bar. I have been a member of the bar since 1986, engaged in the practice of law in both the public and private sector.

I participated in the investigation of MobileMedia Corporation, et al. ("the Company"), and reviewed the report to the FCC that preceded issuance of the hearing designation order, WT Docket No. 97-115. On September 30, 1996, in connection with that investigation, I interviewed Todd Wheeler, Senior Director of Network Planning for the Company. Also participating in the interview were Davida Grant, an associate at Wiley, Rein & Fielding, and Michael Guzman, an associate at Latham & Watkins. Following the interview, Ms. Grant prepared the attached memorandum of the interview dated October 8, 1996 for my review. I did review the memorandum, which, to the best of my recollection, accurately recounts the substance of the interview.

As shown at page 3 of the memorandum, Mr. Wheeler advised us that in a conversation with John Kealey (the COO) he had questioned the appropriateness of filing inaccurate Forms 489. Wheeler further stated to Kealey that, based on Wheeler's prior experience at BellSouth, "you could not file deficient forms." Mr. Wheeler, who was not an officer of the Company, was the employee referred to at page 14 of the October 15, 1996 Counsel's Report filed on behalf of the Company with the Federal Communications Commission. A comparison of the language on page 3 of the Wheeler interview memorandum and the passage on page 14 of the October 15 report demonstrates clearly that the referenced individual was Mr. Wheeler and not Mr. Witsaman.

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge and belief.

  
Christopher D. Cerf

May 21, 1997

# WILEY, REIN & FIELDING

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## MEMORANDUM

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Prepared in Anticipation of Litigation*

TO: Michael Guzman  
FROM: Wiley, Rein & Fielding  
DATE: October 8, 1996  
RE: Interview of Todd Wheeler

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We interviewed Todd Wheeler on September 30, 1996. The interview lasted approximately one hour. We informed Todd that the law firms of Wiley, Rein & Fielding and Latham & Watkins are both counsel for Mobile Media. Thus, the attorney-client privilege protecting this conversation belonged to the company and not to him. Todd indicated that he understood.

Todd is the Senior Director of Network Planning. He has been an employee of MobileComm for approximately 12 years. After the merger of Mobile Media and MobileComm, Todd remained with the company. Todd's responsibilities include generating a one to three-year prospectus for the company regarding spectrum expansion, providing a capacity analysis,

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projecting sales growth, managing telecommunications, and creating and managing the capital budget.

Todd said he met Gene Belardi in February of 1996. According to Todd, Gene called a meeting to discuss the FCC's license freeze and how to best prepare for the new auction process. He said they discussed frequency planning, frequency strategy and the FCC's filing fee.

Todd said that prior to the February Spectrum Planning meeting, he does not recall any discussions regarding "covering" 489s. Todd said that, at that time, he was focused solely on where the company was and where it was going. He said the 489 issue may have been discussed at the February meeting, but he does not recall.

Todd said that during the February time period, he knew that the company had numerous construction permits, but he did not recall knowing that the permits were about to expire. Todd said, "Don't recall seeing any CP expiration points."

Todd stated he remembers John Kealy coming down to the Jackson office and discussing CPs that were filed. Todd said that Kealy said the company needed to go back and construct. Todd said that he and Kealy discussed the budget and the need to "go back and fulfill the licenses."

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Todd said he first learned that Forms 489 were filed without the site being operational in May during his preparation for the June Meeting. Todd said he was familiar with the term "Belardi Network", which meant virtual network. Todd said he discussed the 489 issue with John Kealy. He said he told Kealy that you could not file deficient Forms 489 at BellSouth. Further, he told Kealy he could not believe the company was doing this. He said that Kealy replied that Mobile Media was a smaller company, thus, it could measure risks in a different way. Todd said he never talked to Gene about the 489 issue. Further, he stated that he did not have a reporting relationship with Gene.

Todd said he attended the January 25-26 meeting, but he does not remember any discussion of the 489 issue. He said the focus of the meeting was integrating the three businesses.

Todd stated that he has never signed any Forms 489, nor seen any drafts of Forms 489. Todd said he saw copies of Forms 489 when he was in the Field, but he has not seen any copies since he moved to the corporate office.

Todd said he does not recall any discussions with Mark Witsamin regarding the 489 issue prior to the Spring of 1996. In the discussions he had with Witsamin and other members of

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the engineering team, Todd said the focus of the discussions was whether certain sites were operational. Todd said he does not recall anyone registering a complaint about Forms 489 being filed although the stations were nonoperational. However, Todd stated that he expressed his discomfort about the issue with Kealy and possibly with Witsamin.

Todd stated that he never had personal knowledge that a Form 489 was filed for a particular nonoperational site.

Todd said he had some involvement with the 40-mile application process. Todd said he uses a mapping software package to determine where the company has licenses and where the company can acquire additional frequencies for expansion. To assist in this endeavor, Todd said that Debra Hilson, Associate Manager for Corporate and Regulatory Affairs, provides him with three lists of the company's frequencies. Todd said the lists contain information on the company's sites which are licensed and operational, sites with existing CPs and sites with pending license applications. Todd said he would send a memorandum to the various Field offices requesting recommendations for expansion. Todd said that once he received the Field recommendations, he would use the mapping software to determine where the company should

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expand. Then, he said an exhibit would be generated reflecting the 40-mile filing recommendations.

Todd stated that he was not aware that the 40-mile applications were based on deficient Forms 489. Todd said that when he received the lists from Hilson, which contained the sites which were licensed and operational, he assumed that this information was correct. Todd said he relied on the accuracy of the lists provided by Hilson in making 40-mile filing recommendations. Todd said that he did not know that some 40-mile applications were based on deficient Forms 489 until the middle of August.

Todd stated that he does not recall any conversations or discussions in the Spring of 1996 concerning prioritizing budgeted expenses in order to allow for the construction of nonoperational sites. Todd said the budget for 1996 was altered on three occasions. Todd said that he and J. Campbell O'Keefe were directed to assess how much it would cost to integrate Mobile Media and MobileComm. Todd said the first budget was presented the second week of February, the second was presented on April 19th, and the third was presented in May. Todd said there was no provision in the budget for "covering" deficient 489s in the first two

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budgets. Todd said he believes the 489 issue may have been addressed in the third budget.

Todd said that at some point, it was estimated that it would cost the company \$3.4 million to "build-out" the 489s. He could not remember who came up with the \$3.4 million figure or when this figure was generated. Todd said that at the time of this estimation, he had no idea of the exact number of nonoperational sites.

Todd said that in dealing with supplemental costs, he tried to stay grounded in the established budgetary plan. Todd said he would ask himself whether the additional cost was necessary, and, if so, what the company could offset. Todd said that the problem in addressing the 489 issue was that he did not know how many sites were involved. Moreover, Todd said that there were other challenges present which were inherent to his position. Todd said he was waiting for management to give him a clear sense of priority.

Todd stated that he sent a revised budget to the management which included the \$3.4 million cost. Todd said that Santo Pittsman wanted to see the revised budget in order to get an idea of the expenses for the upcoming third and fourth quarters. Todd said that Pittsman wanted to look at the entire budgetary picture.

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Todd stated that the company determined in late August or early September that the costs of "building-out" deficient 489s far exceeded the estimated \$3.4 million. Todd said that the 489 issue was specifically addressed in the August budget.

Todd said that he does not have specific knowledge of the Forms 489 or 40-mile application filings.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 1997, I caused copies of the foregoing "Motion to Delete Issue 14(b)," and attachments thereto, to be hand-delivered to the following:

The Honorable Joseph Chachkin  
Federal Communications Commission  
2000 L Street, N.W.  
Room 226  
Washington, DC 20554

Chairman Reed E. Hundt  
Federal Communications Commission  
1919 M Street, N.W.  
Room 814  
Washington, DC 20554

Commissioner James H. Quello  
Federal Communications Commission  
1919 M Street, N.W.  
Room 802  
Washington, DC 20554

Commissioner Rachelle B. Chong  
Federal Communications Commission  
1919 M Street, N.W.  
Room 844  
Washington, DC 20554

Commissioner Susan Ness  
Federal Communications Commission  
1919 M Street, N.W.  
Room 832  
Washington, DC 20554

Mr. William E. Kennard  
General Counsel  
Federal Communications Commission  
1919 M Street, N.W.  
Room 614  
Washington, DC 20554

Daniel B. Pythyon  
Acting Chief  
Wireless Telecommunications Bureau  
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Rosalind K. Allen  
Deputy Chief  
Wireless Telecommunications Bureau  
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Gary P. Schonman  
Enforcement Division  
Wireless Telecommunications Bureau  
2025 M Street, NW, Room 8308  
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D. Anthony Mastando  
Enforcement Division  
Wireless Telecommunications Bureau  
2025 M Street, NW, Room 8324  
Washington, DC 20554

  
Phillis Merriett

May 21, 1997